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In the Supreme Court of the United States
October Term 1973

No. 73-434
WILLIAM G. MILLIKEN *et al.*,
Petitioners,
v.
RONALD G. BRADLEY *et al.*,
Respondents.

No. 73-435
ALLEN PARK PUBLIC SCHOOLS *et al.*,
Petitioners,
v.
RONALD G. BRADLEY *et al.*,
Respondents.

No. 73-436
GROSSE POINTE PUBLIC SCHOOL SYSTEM,
Petitioner,
v.
RONALD G. BRADLEY *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE CITY OF BOSTON, MASSACHUSETTS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

In the face of burgeoning urban problems, the City of Boston, like most major American cities, is concerned with ways to achieve equal educational opportunities for the children who reside within it — equality both amongst its own residents and in relation to other children in the Boston metropolitan area. The City has shown a commitment to metropolitan approaches to education substantially predating a desegregation lawsuit in which its School Committee is presently a defendant.

More than 1,800 minority children who live in Boston are attending public schools in neighboring suburban communities under the auspices of the Metropolitan Council for Educational Opportunity (METCO), as authorized by Mass. Ann. Laws Ch. 76, §§ 12A, 12B (1971). Children from a number of suburban communities are attending "magnet" public schools and participating in other city-based educational programs with Boston children. City officials have recently contributed to the establishment and operation of the Metropolitan Planning Project, a consortium with seventeen suburban public school systems instituted under the federal Emergency School Aid Act, 20 U.S.C. § 1608(a)(2)(1972), with the purpose of eliminating minority group isolation in the schools through collaborative metropolitan planning.

The City of Boston believes that the questions raised in the petitions for certiorari are susceptible to a number of different approaches. We present this brief, amicus curiae, as a possible alternative to the approach urged by respondents, whose objective of equal educational opportunities we feel we share.

ARGUMENT

I

INTRODUCTION

The District Court found, upon the conclusion of an extensive trial, that "both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit," *Bradley* v. *Milliken*, 338 F. Supp. 582 at 592. As to the Detroit Board of Education, that conclusion is not being seriously contested in this Court. The record supports the contention of the petitioners that no acts of discrimination by the suburban school districts against the respondents have been either alleged or proved.

As a threshold matter this Court must consider two questions: whether the finding of the courts below that the State of Michigan, its officers or agents, have intentionally contributed to the segregation of respondents was supported by substantial evidence; and whether discriminatory acts by the Detroit Board of Education contributing to the segregation of respondents are, for the purposes of the fourteenth amendment, state action which thereby imposes remedial responsibility upon the State. On the assumption that this Court answers either threshold question affirmatively, there would be no question that the district court had the *power* to adopt a remedy which went beyond the geographical confines of the City of Detroit.[1]

[1] At least this much is conceded in the brief of petitioner Grosse Pointe Public School System. That brief says:

> Where *essential* to provide a remedy for a clearly cognizable constitutional violation, political subdivision lines *may* be subject to modification by the exercise of the equitable powers of the federal judiciary.[*]

[*] Clearly, *Gomillion* v. *Lightfoot*, 364 U. S. 339, 5 L. Ed. 2d 110 (1960) and *Reynolds* v. *Sims*, 377 U. S. 533, 12 L. Ed. 2d 506 (1964), are determinative of the question of the ultimate *power* of the federal court with respect to school district lines. . . . (Brief for petitioner Grosse Pointe Public School System p. 46.)

There is, of course, a substantial difference between the power of the district court to order metropolitan remedies and the propriety of the court's ordering particular metropolitan remedies. Amicus contends that the principles enunciated by this Court in *Brown* v. *Board of Education* (*Brown II*), 349 U. S. 294 (1955), *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), and other school desegregation cases support the conclusion of the courts below that a Detroit-only desegregation plan will not vindicate respondents' rights to equal protection of the laws, and further that those principles require at a minimum development of a remedy which would, in addition to achieving "the greatest possible degree of actual desegregation," *Swann*, *supra* at 26, within the City of Detroit, provide for: 1) "an optional majority to minority transfer provision," *Swann*, *supra* at 26, effective across school district lines throughout the metropolitan Detroit area; and 2) affirmative action by the State of Michigan, its officers and agents, in pursuing their educational policies and programs, to promote further desegregation throughout the Detroit metropolitan area. Whatever conclusion this Court reaches about the district court's order for the development of a plan of desegregation to effect the reassignment of pupils across school district lines, this Court should affirm the propriety and necessity of a remedy incorporating these two points.

II

THIS COURT MUST AT LEAST ALLOW FOR THE DEVELOPMENT OF A PLAN WHICH WOULD, IN ADDITION TO ACHIEVING MAXIMUM POSSIBLE DESEGREGATION WITHIN DETROIT, PROVIDE FOR A MAJORITY-TO-MINORITY TRANSFER OPTION, EFFECTIVE ACROSS SCHOOL DISTRICT LINES, THROUGHOUT THE METROPOLITAN AREA.

It is no longer contested that respondents have suffered a denial of their constitutional rights. In *Swann* this Court suggested the parameters of remedial judicial authority:

> . . . [A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct by a balancing of the individual and collective interests the condition that offends the Constitution. 402 U. S. at 15–16.

The "individual and collective interests" which must be balanced with those of the respondents to be freed of the consequences of the deprivation of their constitutional rights may be summarized as follows:

1) maximum retention consistent with constitutional requirements of the choice to attend schools in their own communities for the hundreds of thousands of school children in the Detroit metropolitan area and their parents;[2]

2) the maintenance of control by the State of its own internal political structure;[3]

3) the maintenance of local control over those aspects of educational policy making which have historically been a function of local school districts in the State of Michigan.[4]

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[2] See *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189, 240–52 (1973) (Mr. Justice Powell concurring in part and dissenting in part); *Bradley* v. *Milliken*, 484 F. 2d 215, 264–68 (6th Cir. 1973) (Weick, J., dissenting).

[3] See *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 40–44, 49–50, 58 (1973); *Wright* v. *Council of the City of Emporia*, 407 U. S. 451, 478 (1972) (Mr. Chief Justice Burger dissenting); *Bradley* v. *School Board of City of Richmond, Virginia*, 462 F. 2d 1058, 1066–70 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U. S. 92 (1973).

[4] See *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 40–50 (1973); *Wright* v. *Council of the City of Emporia*, 407 U. S. 451, 467–69 (1972); *Id.* at 477–78 (Mr. Chief Justice Burger dissenting); *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189, 240–248 (1973) (Mr. Justice Powell concurring in part and dissenting in part).

As long ago as 1955 this Court recognized that school desegregation decrees would have to deal with the difficult kinds of administrative problems before it in the present case. In *Brown II* Chief Justice Warren said for a unanimous Court:

> . . . [T]he courts may consider problems related to administration arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. 349 U. S. at 300–01.

The "breadth and flexibility . . . inherent in equitable remedies" (*Swann*, *supra* at 15) conditioned by "a facility for adjusting and reconciling public and private needs" (*Brown II*, *supra* at 300), afford the district courts the means required for resolving competing interests. The remedies proposed by amicus promise to respondents a meaningful vindication of their constitutional rights while preserving the integrity of countervailing public concerns.

The principal question in this case is not, as petitioners suggest, whether a majority black school system, as such, is unconstitutional. Rather it is whether black children who have been the victims of racial discrimination may constitutionally be confined in majority black schools, without any option of attending practicably available schools within the same state not enrolling a majority of blacks.

The focus for assessing the constitutionality of a given school system cannot simply be on the ratio of black to white students in each school; the *Swann* case specifically rejects such a notion, 402 U. S. at 24–25. Rather, the focus must be on the relationship of the school system to the child, whose rights are protected by the fourteenth amendment. Mr.

Justice Powell, commenting upon this relationship in *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973), stated of each child:

> . . . [*A*]*s a minimum . . . one has the right not to be compelled by state action to attend a segregated school system.* 413 U. S. at 225.

While Mr. Justice Powell went on to explain that by "segregated school system" he meant segregated in law rather than in fact, the *Swann* case makes clear that the simple reassignment of pupils does not end the de jure character of a school system which has been unlawfully segregated, so long as any majority black schools remain. Recognizing that pupil reassignment is a critical factor in most any constitutional plan of remedy, the unanimous Court was quite clear in *Swann* that where, after reassignment is completed, majority black schools continue to exist, more is required:

> An optional majority-to-minority transfer plan has long been recognized as a useful part of *every* desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an *indispensable remedy* for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant to the transferring student free transportation and space must be made available in the school to which he desires to move. Cf. *Ellis* v. *Board of Public Instruction.* 423 F. 2d. 203, 206 (CA5, 1970). 402 U. S. at 26–27.

If this Court prohibits the district court from entering any sort of metropolitan decree, it will simultaneously preclude this "indispensable remedy" for unconstitutional segregation. For the record establishes (exhibits PC–2, PC–3) that "the greatest possible degree of actual desegregation," *Swann,* 402 U. S. at 26, within the City of Detroit would result in virtually

all schools having a majority of black pupils; thus there would be virtually no schools within the City of Detroit to which an aggrieved black child would have the right of transfer. Preservation of the right of these children "to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation" requires at least this metropolitan remedy. Assuredly, such an option should be extended reciprocally to black and white children through the metropolitan area affected by a final decree, as implicitly required by *Swann*, 402 U. S. at 26. The reciprocal existence of the option can only promote further desegregation.[5]

Wright v. *Council of the City of Emporia*, 407 U. S. 451 (1972), and *United States* v. *Scotland Neck Board of Education*, 407 U. S. 484 (1972), both of which find majority black school systems to be constitutionally acceptable in the process of desegregation, do not support petitioners' assertion that the district court must fashion a remedy solely within Detroit city limits. In neither case was the right to a majority-to-minority transfer option asserted; nor was evidence introduced as in the present case, establishing the practicable availability of schools with respect to which a majority-to-minority transfer option could have been exercised.

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[5] In its brief in *United States* v. *Board of School Commissioners of Indianapolis, Indiana*, Nos. 73–1968 to 1982 and 1984 (7th Cir., filed Jan., 1974), the Government advances the following position:

> . . . [W]here transfers across district lines have been allowed in the past for educational purposes, and where black children have been effectively excluded from the opportunity to attend schools in particular systems and must instead attend school in a *de jure* segregated system because housing discrimination has determined where they may attend school, part of the remedy for the *de jure* segregation may be transfers across district lines. . . . p. 25.

In the present case the district court found that transfers across district lines have been allowed for educational purposes in the Detroit area, *Bradley* v. *Milliken*, 345 F. Supp. 914, 935, and that housing discrimination has determined where black children may attend school. *Bradley* v. *Milliken*, 338 F. Supp. 582, 587.

Similarly, *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D. N. J. 1971), *aff'd mem.* 404 U. S. 1027 (1972), relied upon by petitioners, is inapposite. The court in that case, in refusing to "remedy" schools and school systems which were majority black, had received no evidence of actionable racial discrimination as is present in the case currently before this Court.

The remedy proposed by amicus would preserve local control in any school system which had not itself been found to have acted unconstitutionally. As this Court found desirable in upholding Texas' statutory scheme for financing public education in *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 52 n.108 (1973), "the preponderating bulk of all decisions affecting the schools [would be] made and executed at the local level, guaranteeing the greatest participation to those most directly concerned"—except for those parents who found educational offerings outside their communities sufficiently attractive to justify voluntarily relinquishing the education franchise as it affects the schools their children attend. The State of Michigan could retain control over the demarcation of political subdivisions. And each family which found the school/community nexus of critical importance could choose to have its children attend schools in the community, i.e., political subdivision, of their residence.

In the event this Court does not sustain the district court's order of the development of a desegregation plan which will assign children to schools across district lines, it certainly must as a starting point reiterate the requirement of *Swann* that "the greatest possible degree of actual desegregation," 402 U. S. at 26, be undertaken within the City of Detroit. The accompanying requirement of a real and meaningful transfer option of the type found "indispensable" in *Swann* and urged by amicus is the minimum acceptable if the violations established are to be remedied.

III

THE STATE OF MICHIGAN, ITS OFFICERS AND AGENTS, MUST TAKE AFFIRMATIVE ACTION TO PROMOTE FURTHER DESEGREGATION THROUGHOUT THE METROPOLITAN AREA.

In a remedy which involves more than a single school system, accountability of State defendants to the courts is necessary to the vindication of respondents' rights. The record discloses no other existing agencies competent to coordinate the administration or financing of a multidistrict remedy. The role of the State, its officers and agents, surely includes an obligation "to take affirmative action to disestablish all state enforced or encouraged public school segregation and to eliminate the effects of past state enforced or encouraged racial discrimination," *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 480 (M.D. Ala. 1967), *aff'd mem. sub. nom.*, *Wallace* v. *United States* 389 U. S. 215 (1967).

While it is for the district court to identify the particulars of state responsibility, state-directed decrees in earlier desegregation cases, such as *Lee* v. *Macon County Board of Education*, *supra*, and *United States* v. *State of Texas*, 447 F. 2d 441 (5th Cir. 1971), *modifying* 330 F. Supp. 235 (E.D. Tex. 1971); *stay denied sub. nom. Edgar* v. *U. S.*, 404 U. S. 120 (1971), *cert. denied*, 404 U. S. 1016 (1972), suggest some of the appropriate areas of state administrative responsibility:

a. Student transfers (*State of Texas*, *supra* at 443). The State defendants may be required in the present case to provide public information and education on the availability of a majority-to-minority transfer option, perform oversight "clearinghouse" administration, and arrange, either through their

own resources, or by securing agreements from the school districts involved, for the financing of a pupil transfer program.

b. School construction (*Lee*, *supra* at 480–81). The State defendants already have responsibilities in the area of school construction, *Bradley* v. *Milliken*, 484 F. 2d, 215, 238. To the extent that new construction is contemplated, or structural remodeling required by the implementation of a plan of desegregation, State defendants may be ordered to exercise their statutory powers so as to promote further desegregation and arrange for necessary financing.

c. School transportation (*Lee*, *supra* at 481–82; *State of Texas*, *supra* at 445). Again the State defendants may be required to provide administration and arrange financing.

In *Lee*, *State of Texas*, and similar desegregation decrees entered against State officials in other states,[6] district courts exercised authority as broad as statewide remedies required. In the present case, the district court should be able to issue a decree equally as broad in substance, confined only by the geographical practicability of remedying the violation of the constitutional rights of the respondents.

CONCLUSION

WHEREFORE, if this Court fails to affirm the order of the district court for the development of a metropolitan desegregation plan which would reassign pupils across school district lines, it should at least affirm the propriety and necessity of a remedy which achieves maximum possible desegregation within the City of Detroit, establishes a majority-to-minority transfer option throughout the metropolitan area, and places

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[6] See, *e.g.*, *United States* v. *Georgia* (N.D. Ga. No. 12972, Dec. 17, 1969), as reported in 1 Race Rel. L. Survey 253 (1970); *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916 (1960); *stay den.* 364 U.S. 500 (1960); *aff'd.* 365 U.S. 569 (1961).

upon the State of Michigan, its officers and agents, the responsibility to promote further desegregation throughout the metropolitan area.

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